LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 13 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 275

MORTON SALT COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA FOURTH DIVISION

BRIEF OF MORTON SALT COMPANY IN OPPOSITION TO MOTION TO AFFIRM

L. M. McBRIDE
JOHN P. RYAN, JR.
110 North Wacker Drive
Chicago, Illinois 60606

Counsel for Morton Salt Company

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 275

MORTON SALT COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA FOURTH DIVISION

BRIEF OF MORTON SALT COMPANY IN OPPOSITION TO MOTION TO AFFIRM

The Government's motion to affirm should be denied for three reasons. First, the motion was not filed in compliance with the Rules of this Court. Second, unless the motion is denied, appellant will be deprived of any meaningful review of the District Court's decision. Third, the motion fails to show that this appeal does not raise substantial questions which deserve the attention of this Court.

I. The Motion Was Not Filed in Compliance With the Rules of this Court

On July 21, 1965, the last day on which the Government could file a motion to affirm pursuant to Rule 16 of the Rules of this Court, Mr. Justice White granted the Government's application for an extension of time. Counsel for Morton Salt Company ("Morton") was contacted on July 19 as regards such an extension and indicated no opposition.

The extension granted by Mr. Justice White was to and including August 20.

The Government's motion was filed on August 23, three days late. No contact was made with Morton's counsel as regards a further extension. No further extension was granted by this Court.

Rule 34.2 provides that the Clerk "will refuse to receive any application for extension" sought to be presented after expiration of the period sought to be extended. *A fortiori,* the Clerk should refuse to receive a motion not timely filed. Since the motion was not filed in compliance with the Rules of this Court, the motion should be denied.

II. A Grant of the Motion Would Deprive Morton of Any Review of the District Court's Decision

By virtue of the Expediting Act, 23 Stat. 823, as amended, 15 U.S.C. § 29, Morton did not have the opportunity to obtain a review of the District Court's decision by a court of appeals. Its one and only right to appeal was to this Court. The objective of that statute, i.e., the speedy disposition of appeals in civil antitrust cases brought by the Government, is completely thwarted if such disposition is made without any meaningful review.

The failure of Congress to amend the Expediting Act so as to provide for intermediate review is perhaps unfortunate, but litigants should not be deprived of any right to review because of Congressional inaction. We agree with the view expressed earlier this year by the dissenting Justices in *Kennecott Copper Corp.* v. *United States*:

> "So long as this statute remains on the books and Congress provides no intermediate review, see *United States* v. *Singer Mfg. Co.,* 374 U.S. 174, 175, it is our view that the policy of the Act is, in general, best served by plenary rather than summary dispositions of such appeals." 85 S. Ct. 1575 (1965)

In *Singer,* this Court expressly recognized the deprivation inherent in summary affirmance:

> "We noted probable jurisdiction in light of the fact that unless we did so the parties would be deprived of any appellate review in the case." 374 U.S. at 175 (1963)

The deprivation inherent in summary disposition of Expediting Act appeals is serious in any case but is doubly so here because of the Government's defeat in the companion criminal case which was tried on the same record. After dispositions on the merits of these two companion cases the parties stand in a draw. The jury, which saw and heard all the witnesses, found appellants not guilty; the District Court, which saw and heard none of the witnesses, held against the appellants on the same evidence.[1] Under such circumstances a meaningful review by at least one appellate tribunal—and this Court is the only forum available to appellant—is essential.

The importance of review in this case is underscored by the fact that the District Court's decision completely nullified the jury's not guilty verdict for all practical purposes. Notwithstanding the prior acquittal, the District Court's decision has spawned an avalanche of treble damage suits, in each of which the plaintiffs have indicated that they intend to rely on the adverse holding of the court below. A grant of the Government's motion would thus deprive Morton of the opportunity to demonstrate the error in the

---

1. As pointed out in Morton's Jurisdictional Statement (p. 22), the conflicting conclusions reached by the jury and the court below are *possibly* explained on the basis of a difference in burden of proof, but there is no indication whatever that the jury's not guilty verdict would have been otherwise had the jury been instructed in terms of "preponderance of the evidence" rather than "reasonable doubt".

District Court's decision, not only for purposes of defeating the injunction entered against Morton, but also for purposes of canceling the adverse effect which such decision may have as regards the multi-million dollar treble damage claims by hundreds of claimants now pending in five district courts against Morton and other companies in the salt industry.

III. The Motion Fails to Show that the Questions Presented are Manifestly Unsubstantial

The motion to affirm does not meet the requirements of Rule 16.1(c) and fails to address itself to the issues underlying the two questions raised on this appeal, all of which are issues of substantial importance which should be resolved by this Court.

A. Question No. 1

In the space of three pages (Motion to Affirm, pp. 5-7) the Government purports to demonstrate to this Court that there is, in the 3,700-page record of the trial, "ample evidence" to support the District Court's finding of conspiracy. As regards Morton, evidence of two instances of pre-bid communications are described in an attempt to create the impression that such evidence is typical of the entire record and is sufficient to support the finding of the court below. A proper appraisal of these two incidents can be made only in light of the following facts:

1. The two bids involved in these incidents are the only bids, out of the 128 made during the five-year period involved in the trial, where there is any evidence of a pre-bid communication from Morton to any competitor.

2. In both instances the only Morton employee involved in any of the communications was a regional

sales manager having no pricing authority whatsoever. (Tr. pp. 2953-54 and p. 3019)

3. Cargill was the only competitor of Morton with whom the sales manager communicated concerning either of such bids.

4. The absence of any price-fixing agreement between Morton and Cargill was affirmatively proved by the following evidence as to Cargill's conduct and by the Government's concession that Cargill was not a conspirator:

(a) During the entire period covered by the complaint Cargill was following an independent pricing policy which regularly entailed Cargill's underbidding its competitors on most large bids, including the 1959 bid to Indiana. (Tr. pp. 1314-15, p. 1483, p. 1409, p. 1529, pp. 1536-37, pp. 1442-43, pp. 1553-54 and pp. 3068-70)

(b) Cargill's witnesses specifically denied entering into any price agreement as regards these two bids. (Tr. p. 1529)

(c) Apart from its practice of underbidding its competitors, Cargill's conduct toward the defendants affirmatively shows it was not a conspirator. (Tr. pp. 1505-11, pp. 1558-59, p. 888, p. 1326 and pp. 1563-64)

(d) Not surprisingly, the Government throughout the case (see Morton's "post-trial" reply brief, pp. 14-16) took the position that Cargill, the "maverick", was on the outside of the alleged conspiracy;

> "From the beginning Cargill was a maverick. Its concept of competing for the trade was to cut prices. (Tr. 1307)." (Government's initial "post-trial" brief, p. 8)

The lack of merit in the Government's motion to affirm, especially as regards its principal argument relating to

the above two incidents, is apparent when viewed in light of the District Court's findings. First, there is no finding with respect to either of these two specific incidents. Second, there is no finding that *any* bid submitted either to the State of Wisconsin or the State of Indiana was conspiratorial; there is, in fact, no finding that any conspiratorial bid was submitted to any particular one of the sixteen government agencies involved in the case. Third, and of paramount importance, there is no finding of any conspiracy between Morton and Cargill, or, for that matter, between Morton and any other competitor, *the District Court never having identified the co-conspirators with whom Morton was supposed to have conspired.*

The Government's motion fails to meet the principal issues raised under Question No. 1. The motion does not disclose whether the Government agrees with the present Attorney General of the United States and his predecessor (see Morton's J. S., pp. 10-12) that identical bidding is, in and of itself, an economic evil, to discourage which ("however lawful" such practice may be) the resources of the Federal Government can or should be brought to bear. Nor does the motion indicate whether there is agreement with the Government's constantly reiterated position in this case (see Morton's J. S., pp. 12-14), i.e., that a pricing *policy* to attempt to meet a predicted low bid is, in and of itself, illegal. This appeal thus presents to this Court a question of fundamental importance to the enforcement of Section 1 of the Sherman Act, a question which, until now, was thought by most antitrust lawyers to have been resolved by the *Theatre Enterprises* decision, namely, whether an agreement (express or implied and however proved) is an indispensable element of an illegal price conspiracy.

B. Question No. 2

The second question presented on this appeal goes to the right of the Government to re-prosecute a defendant in a "civil" antitrust case after having been defeated in a previous attempt to prove the identical charge in a criminal case. Appellants[2] contend that both the doctrine of *res judicata* and the protections afforded by the Fifth Amendment prohibit such a double prosecution. The Government disagrees but its motion to affirm does not meet the issues raised in Morton's Jurisdictional Statement.

1. In the discussion of *res judicata,* appellants suggested that this Court, after a reexamination of its decision in *Real Estate Boards,* return to the principle enunciated in *Coffey,* i.e., where "the fact or act has been put in issue and determined against the United States", there can be no relitigation of the issue regardless of possible differences in applicable burdens of proof. The Government makes no response to the three reasons cited by appellants for a re-examination of *Real Estate Boards.* No response is made to appellants' argument (Morton's J. S., p. 21, n. 8) that *Real Estate Boards* is in conflict with *Coffey,* in that the basis for this Court's distinguishing of the *Coffey* case in *Real Estate Boards* was unsound. No response is made to appellants' argument (Morton's J. S., p. 22) that the applicability of a *res judicata* defense should not be dependent on *mere possibilities* as to the rationale of a jury's not guilty verdict. No response is made to the observation (Morton's J. S., p. 22) that *fairness considerations* dictate that the rule of the *Coffey* case should prevail over that of *Real Estate Boards.*

---

2. The plural is used because Diamond Crystal Salt Company, separately appealing to this Court in No. 276, has adopted *in toto* the argument presented under Question No. 2 herein and in Morton's Jurisdictional Statement.

Rather than respond to such issues, the Government weakly asserts that appellants "suggest no reason" for a reexamination of *Real Estate Boards*. Although their development must await the opportunity afforded by plenary review, the reasons for such reexamination have been clearly suggested, and the Government has simply chosen to ignore them. The failure to respond can mean only that the Government was unable to formulate a persuasive defense of *Real Estate Boards*.

2. Similarly, the Government's approach to the Fifth Amendment question presented by appellants is one of avoiding the issues. Appellants pointed out (Morton's J. S., p. 23) that, in *1958 Plymouth*, decided last term, this Court, electing to disregard technical procedural distinctions when determining the applicability of Constitutional protections, held that a civil forfeiture action was "quasi-criminal" for Constitutional purposes. The Government made no response to the asserted significance of this Court's recent decision.

Appellants cited two reasons why Government injunction actions should also be characterized as punitive or quasi-criminal. The first was that the Government must prove a crime in order to prevail in such an action. As no response was made to this observation, it must be assumed that the Government agrees with the authorities cited by appellants for this proposition of law.

The second reason cited by appellants is only obliquely answered by the Government in its motion to affirm. The Government does not attempt to deny that treble damage actions are punitive. And, although the Government expressly concedes only that its injunction actions "open the way" and "facilitate" treble damage actions, the Government does not deny that the avowed policy of the Department of Justice is to affirmatively *assist* treble damage

plaintiffs by instituting injunction actions. Nevertheless, simply by citing the *Real Estate Boards* and *National Lead* decisions, the Government maintains that the purpose of such suits is "remedial".

The Government's argument ignores the fact that both *Real Estate Boards* (1950) and *National Lead* (1947) were decided prior to this Court's acknowledgment (Morton's J. S., p. 28) in *Glenshaw Glass* (1955) that treble damage actions are punitive. The argument also ignores the fact that these cases were decided prior to the expressed adoption by the Department of Justice of its policy of affirmatively aiding treble damage plaintiffs. The argument further ignores the impact of *1958 Plymouth*, where this Court characterized a civil forfeiture proceeding as "quasi-criminal", in part because the forfeiture proceeding (involving property valued at only $1,000) required, as here, "the determination that the criminal law has been violated." Whether injunction actions under Section 4 of the Sherman Act should be characterized as quasi-criminal for purposes of prohibiting re-prosecution of antitrust charges by the Government is a question that should be resolved by the Court after plenary consideration of the issues.

CONCLUSION

For the foregoing reasons, the motion to affirm should be denied. Probable jurisdiction of the questions presented on this appeal should be noted.

Respectfully submitted,

L. M. McBride
John P. Ryan, Jr.

Counsel for Morton Salt Company

September, 1965